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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

OLGA SEGURA, Plaintiff and Respondent, v. CROWN POLY, INC. et al., Defendants and Appellants.	B287170 (Los Angeles County Super. Ct. No. BC661914)

APPEAL from an order of the Superior Court of Los Angeles County, Marc Marmaro, Judge. Affirmed.

Wolflick, Simpson, Khachaturian & Bouayad, Gregory D. Wolflick, David B. Simpson and Adam N. Bouayad for Defendants and Appellants Crown Poly, Inc. and Francisco Serrano.

Law Offices of Ramin R. Younessi, Ramin R. Younessi, Stephen J. Duron and Liliuokalani H. Martin for Plaintiff and Respondent.

Crown Poly, Inc. and Francisco Serrano (collectively Crown Poly parties) appeal the trial court's order denying their petition to compel arbitration of Olga Segura's employment claims. The court ruled the Crown Poly parties had failed to carry their burden to demonstrate an agreement to arbitrate. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Segura's Lawsuit*

Segura worked as a packing production manager for Crown Poly from November 1997 until her employment was terminated in May 2016. In May 2017 Segura sued Crown Poly and her immediate supervisor, Serrano, alleging the company terminated her employment based on her age—66 years old—and her refusal for religious reasons to work on Sundays. Segura's complaint alleged claims for unlawful discrimination and harassment based on age and religion in violation of the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12940 et seq.) and wrongful termination in violation of public policy.

2. *The Crown Poly Parties' Petition To Compel Arbitration*

In November 2017 the Crown Poly parties petitioned to compel arbitration of Segura's claims pursuant to an agreement written in Spanish entitled "Acuerdo de Arbitraje" (Spanish Arbitration Agreement). They included in their supporting papers (1) an unsigned copy of the Spanish Arbitration Agreement; (2) an unsigned copy of an agreement written in English entitled "Arbitration Agreement" and a declaration from a certified translator attesting the English arbitration agreement was a true and correct translation of the Spanish Arbitration Agreement; and (3) a form written in English entitled "Dispute Resolution Agreement Acknowledgment," signed by Segura on

April 30, 2013. The form stated that the undersigned, Segura, had read the "Dispute Resolution Agreement and by my signature below agree to comply with and be bound to such."

The Crown Poly parties argued Segura had agreed to binding arbitration in accordance with the Spanish Arbitration Agreement. Marissa Gaxiola, a Crown Poly human resources employee, attested in a supporting declaration to the circumstances surrounding Segura's purported agreement to arbitrate. Gaxiola stated she met with Segura and 50 or 60 other employees on April 30, 2013 for the sole purpose of explaining the company's arbitration policy to them and obtaining their agreement. Because the employees, including Segura, were native Spanish speakers who were not proficient in English, Gaxiola, who is fluent in both Spanish and English, conducted the meeting in Spanish. Segura did not ask any questions. Gaxiola told the employees that, by signing the acknowledgment form provided, they were giving up their right to have a jury trial in any employment-related dispute and agreeing to resolve those disputes by binding arbitration. At the end of the meeting Gaxiola distributed the English Dispute Resolution Agreement Acknowledgment form to all the employees. Segura signed the acknowledgment in Gaxiola's presence.

3. *Segura's Opposition Papers*

In her opposition to the arbitration petition, Segura argued the Crown Poly parties had not established the existence of an agreement to arbitrate. According to Segura's attorney, who submitted his own declaration, the Crown Poly parties had presented multiple documents that reflected materially different versions of an arbitration agreement in the course of the litigation. He called into question whether Segura had actually

agreed to any of them. In particular, in their demand for arbitration the Crown Poly parties sent to Segura's attorney (1) an unsigned document in English entitled "Dispute Resolution Agreement" (DRA); (2) an unsigned acknowledgment form referring to the DRA; (3) an unsigned copy of the Spanish Arbitration Agreement; (4) an unsigned English translation of the Spanish Arbitration Agreement; (5) an unsigned acknowledgment form in Spanish referring to the Spanish Arbitration Agreement; (6) a DRA acknowledgment form in English containing Segura's signature; and (7) a letter from the Crown Poly parties quoting the DRA and demanding Segura resolve her claims in arbitration in accordance with the DRA. Of those documents, only the DRA acknowledgment form with Segura's signature was contained in Segura's personnel file.

Segura observed the DRA and the Spanish Arbitration Agreement contained several materially different terms and each purported to be the final, fully integrated agreement between the parties superseding all other agreements. Segura argued the Crown Poly parties had failed to carry their burden to demonstrate that she had agreed to arbitrate. She also argued both agreements were procedurally and substantively unconscionable and the Crown Poly parties had forfeited any right they had to compel arbitration. In her declaration Segura also stated she had not seen the Spanish Arbitration Agreement before it was sent to her counsel as part of this lawsuit and denied signing the DRA acknowledgment form.

In reply the Crown Poly parties provided evidence to support the authenticity of Segura's signature on the DRA acknowledgment form and emphasized Gaxiola's testimony that Segura had signed the DRA acknowledgment form to reflect her

agreement to arbitrate in accordance with the Spanish Arbitration Agreement Gaxiola distributed at the April 30, 2013 meeting. The Crown Poly parties did not argue that the DRA or the DRA acknowledgment was the controlling agreement. At the hearing they conceded the DRA had never been given to Segura.

Finally, the Crown Poly parties objected to Segura's declaration, asserting nothing in Segura's opposing papers indicated that Segura, a non-English speaker, understood the English language declaration she signed. Although Segura included with her opposing papers a signed statement by a certified Spanish interpreter stating she had "accurately interpreted from English to Spanish . . . the preceding Declaration," nothing in the interpreter's statement identified the declaration she purportedly translated as Segura's.

4. *The Court's Ruling Denying the Arbitration Petition*

The trial court sustained the Crown Poly parties' objections to Segura's declaration, but found the Crown Poly parties had failed to carry their burden to demonstrate a valid arbitration agreement. The court acknowledged at the outset that, had the only evidence before the court been the documents the Crown Poly parties had submitted with their moving papers, it "would find this evidence to be persuasive" that Segura had agreed to arbitration in accordance with the terms of the Spanish Arbitration Agreement. However, the admissible evidence presented in the opposing papers showed two materially different and mutually exclusive agreements—the Spanish Arbitration Agreement and the DRA— and the acknowledgment Segura purportedly signed referred only to the DRA that the Crown Poly parties acknowledge was never given to Segura. Finding "no textual continuity between the DRA acknowledgment Plaintiff

signed and the [Spanish] Arbitration Agreement Defendants seek to enforce," the court ruled the Crown Poly parties had failed to carry their burden to establish an agreement to arbitrate. The court also questioned the credibility of Gaxiola's declaration that Segura had signed the DRA acknowledgment at the meeting after Gaxiola had read and discussed the Spanish Arbitration Agreement: "Given that the meeting took place over four years ago and that the Plaintiff did not ask any questions or otherwise draw attention to herself, the court questions whether Gaxiola specifically remembers that Plaintiff was present at the meeting and that Plaintiff signed the Spanish language Arbitration Agreement as Gaxiola attests." In light of its ruling that no agreement to arbitrate had been proved, the court did not reach Segura's arguments concerning waiver and unconscionability.

DISCUSSION

1. *Governing Law and Standard of Review*

Code of Civil Procedure section 1281.2 requires the trial court to order arbitration of a controversy "[o]n petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party to the agreement refuses to arbitrate such controversy . . . if it determines that an agreement to arbitrate the controversy exists." As the language of this section makes plain, the threshold question presented by every petition to compel arbitration is whether an agreement to arbitrate exists. (*American Express Co. v. Italian Colors Restaurant* (2013) 570 U.S. 228, 233 [133 S.Ct. 2304, 186 L.Ed.2d 417] [it is an "overarching principle that arbitration is a matter of contract"]; *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.* (1985) 473 U.S. 614, 626 [105 S.Ct. 3346, 87 L.Ed.2d 444] ["the first task

of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute"]; *Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 236 (*Pinnacle*) [""a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit""]; *Esparza v. Sand & Sea, Inc.* (2016) 2 Cal.App.5th 781, 787 ["[t]here is a strong public policy favoring contractual arbitration, but that policy does not extend to parties who have not agreed to arbitrate"].)

The party seeking to compel arbitration bears the burden of proving by a preponderance of the evidence an agreement to arbitrate exists. (*Pinnacle, supra*, 55 Cal.4th at p. 236; *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 413; *Tiri v. Lucky Chances, Inc.* (2014) 226 Cal.App.4th 231, 240.) Only when the agreement has been proved does the burden shift to the party resisting arbitration to establish a defense to the enforcement of the agreement, typically by alleging the agreement is void due to fraud-in-the-execution, waiver or revocation. (*Rosenthal*, at p. 413; accord, *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 972; see *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 339 [131 S.Ct. 1740, 179 L.Ed.2d 742] [section 2 of the Federal Arbitration Act "permits arbitration agreements to be declared unenforceable 'upon such grounds as exist at law or in equity for the revocation of any contract'"].)

When, as here, the court's order denying a motion to compel arbitration is based on the court's finding that petitioner failed to carry its burden of proof, the question for the reviewing court is whether that finding is erroneous as a matter of law. (See *Juen v. Alain Pinel Realtors, Inc.* (2019) 32 Cal.App.5th 972, 978-979

["'[W]here the issue on appeal turns on a failure of proof at trial, the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law. [Citations.] Specifically, the question becomes whether the appellant's evidence was (1) "uncontradicted and unimpeached" and (2) "of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding"'"]; *Almanor Lakeside Villas Owners Assn. v. Carson* (2016) 246 Cal.App.4th 761, 769 [same].)

2. *The Trial Court Did Not Err in Denying the Crown Poly Parties' Petition To Compel Arbitration*

The Crown Poly parties do not challenge the court's finding that they failed to carry their burden to prove Segura consented to the Spanish Arbitration Agreement. Rather, they argue the starting and ending point for the court's analysis should have been the signed DRA acknowledgment form. Because the DRA acknowledgment form stated that the undersigned (Segura) and Crown Poly agreed to arbitrate "covered disputes" as defined in the DRA, the signed acknowledgment alone was all that was necessary for the Crown Poly parties to carry their initial burden to show an agreement to arbitrate.

To support their argument for reversing the trial court's order, the Crown Poly parties rely on *Cruise v. Kroger Co.* (2015) 233 Cal.App.4th 390, 396 (*Cruise*), which they mistakenly assert is essentially identical to the case at bar. In *Cruise* the employer petitioned to compel arbitration of the plaintiff's employment claims. The employer submitted with its arbitration petition an undated, unsigned arbitration policy and an employment application signed by the plaintiff, stating, "I acknowledge and understand that the Company has a Dispute Resolution Program

that includes a Mediation & Binding Arbitration Policy (the 'Policy') applicable to all employees and applicants for employment. . . . I acknowledge, understand and agree that the Policy is incorporated into this Employment Application by this reference as though it is set forth in full, . . . the Policy applies to any employment-related disputes . . . and that the Policy requires any Employee who wishes to . . . resolve any Covered Disputes [to] submit the claims or disputes to final and binding arbitration in accordance with the Policy." (*Id.* at p. 393, italics omitted.) The trial court denied the employer's motion to compel arbitration, ruling the employer had not demonstrated the arbitration policy was in existence at the time the employee read and signed the employment application or that it was the same policy to which the application referred. (*Id.* at p. 392.)

The *Cruise* court reversed, holding the arbitration clause in the employment application, standing alone, was sufficient to establish the parties' agreement to arbitrate. The employer's inability to establish that the arbitration policy they sought to enforce was in existence at the time the plaintiff signed the employment application, the court of appeal explained, did not mean the parties had failed to agree to arbitrate. The employment application alone was evidence of an agreement to arbitrate. Any missing terms resulting from the failure to prove the specific policy's existence at the time the employee signed the application simply meant the terms governing the arbitration procedures would be provided by the California Arbitration Act (Code Civ. Proc., § 1280 et seq.). (*Cruise*, *supra*, 233 Cal.App.4th at pp. 392, 397-400; cf. *Baltazar v. Forever 21*, *Inc.* (2016) 62 Cal.4th 1237, 1246 [failure to include arbitration rules constitutes procedural unconscionability only where the

plaintiff's unconscionability claim depends on an actual term in the arbitration rules].)

The question in *Cruise* was whether the agreement to arbitrate contained in the employment application was unenforceable because the petitioner had failed to establish the plaintiff's agreement to the procedures governing the arbitration. The issue here is quite different. Unlike the signed employment application in *Cruise,* which contained an agreement to arbitrate and simply acknowledged the employer had a dispute resolution policy setting forth procedures that would govern any arbitration, the DRA acknowledgment form provided that the signatory "agree[d] to comply with and be bound by" the terms of a specific arbitration agreement, the DRA, which the Crown Poly parties concede Segura never received. Moreover, unlike the employer in *Cruise*, the Crown Poly parties did not argue in the trial court that the signed acknowledgment form was the governing agreement. To the contrary, they expressly argued the agreement they were seeking to enforce was the Spanish Arbitration Agreement and specifically urged the court not to consider any other agreement. Having lost that argument, they now argue, for the first time on appeal, an entirely different agreement provides the basis to compel arbitration of Segura's claims. That contention should have been presented in the Crown Poly parties' moving papers, so Segura and the trial court would have had the opportunity to address it. Under these circumstances, it would not be an appropriate use of our discretion to consider it for the first time on appeal. (See *In re M.H.* (2016) 1 Cal.App.5th 699, 713-714 ["[c]onsidering an issue for the first time on appeal is often unfair to the trial court, unjust to the opposing party, and contrary to judicial economy

because it encourages the embedding of reversible error through silence in the trial court"].)

DISPOSITION

The order denying the Crown Poly parties' petition to compel arbitration is affirmed. Segura is to recover her costs on appeal.

PERLUSS, P. J.

We concur:

ZELON, J.

SEGAL, J.